SUPREME COURT, U. S.

APR 17 1968

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 1331

REVELLE W. BROWN, JOHN A. DIEMAND, DR. GILSON COLBY ENGEL, FRED FOX, WALTER S. FRANKLIN, WALTER B. GIBBONS, ESQUIRE, HUBERT J. HORAN, JR., ESQUIRE, DR. LOUIS P. HOYER, FREDERICK H. LEVIS, DAVID F. MAXWELL, ESQUIRE, MRS. MINA F. OLIVER, ROLAND RODROCK RANDALL and HARRY G. SCHAD, Trustees of the Estate of Stephen Girard,

Petitioners,

v.

COMMONWEALTH OF PENNSYLVANIA, ATTORNEY GENERAL OF THE COMMONWEALTH OF PENNSYLVANIA, CITY OF PHILADELPHIA and ALAN LEVI BOND, by his mother, MRS. RUBY BOND, CHARLES WILLIAM HICKS and THEODORE LEWIS HICKS, by their mother, MRS. MARIE HICKS, JAMES SCRUGGS and HENRY SCRUGGS, by their mother, MRS. ARDELLA SCRUGGS, TYRONE KARL WHITE and TERRY SHERWOOD WHITE, by their mother, MRS. CHARLOTTE L. WHITE, on behalf of themselves and all others similarly situated,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Of Counsel:

GAFFNEY AND GAFFNEY
2124 Philadelphia National Bank Building
Philadelphia, Pa. 19107

MORGAN, LEWIS & BOCKIUS
2107 The Fidelity Building
Philadelphia, Pa. 19109

ARTHUR LITTLETON
JOHN RUSSELL, JR.
ERNEST R. VON STARCK
RICHARD P. BROWN, JR.
Attorneys for Petitioners
2107 The Fidelity Building
Philadelphia, Pa. 19109

INDEX

	PAGE
OPINIONS BELOW	2
JURISDICTION	2
QUESTION PRESENTED	2
CONSTITUTIONAL AND STATUTORY PROVISIONS	3
STATEMENT	3
A. The Prior Related Litigation	4
B. The Nature of Girard College	7
C. The Present Litigation	8
REASONS FOR GRANTING THE WRIT	10
I. The Meaning and Effect of This Court's Mandate and Subsequent Denial of Certiorari in the Prior Litigation Are Peculiarly For This Court's Decision.	12
II. The Court of Appeals Has Erroneously Extended the Doctrine of Shelley v. Kraemer	16
III. The Court of Appeals Has Erroneously Extended the Holdings in Evans v. Newton	19
A. Unlike Evans, the record in this case shows that Girard College has been totally divorced from municipal responsibility or concern since the appointment of private trustees	20
B. The Court of Appeals has incorrectly extended the Evans concept of public function to private schools	21
IV. The Court of Appeals Has Erroneously Extended the Doctrine of Reitman v. Mulkey to the Neutral Exercise of Traditional Judicial Power	23
V. The City's Historical Relationship Does Not Create Present State Action	25
CONCLUSION	27

PAGE

APPENDIX:

Opinion and Order of United States Supreme Court of April 29, 1957 in *Pennsylvania, et al.* v. *Board of Directors of City Trusts of the City of Philadelphia,* 353 U. S. 230 ..... A1

Opinion and Order of Philadelphia Orphans' Court of September 11, 1957 in *Girard Estate,* 7 Fiduc. Rep. (Pa.) 555 ..... A3

Majority Opinion and Order of Pennsylvania Supreme Court of January 24, 1958 in *Girard College Trusteeship,* 391 Pa. 434, 138 A. 2d 844.... A8

Order of the United States Supreme Court of June 30, 1958 dismissing appeal and denying certiorari in *Pennsylvania, et al.* v. *Board of Directors of City Trusts of Philadelphia,* 357 U. S. 570 ..... A28

Pennsylvania Act of November 19, 1959, P. L. 1526, 20 Purdon's Pa. Stat. Ann. §§ 1144.1-1144.9.... A29

Opinion and Order of the United States District Court for the Eastern District of Pennsylvania of July 5, 1967, 270 F. Supp. 782 ..... A34

Opinions and Order of United States Court of Appeals for the Third Circuit of March 7, 1968 .... A54

TABLE OF AUTHORITIES

CASES:

Abington School District v. *Schempp,* 374 U. S. 203 (1963) 22

Barrows v. *Jackson,* 346 U. S. 249 (1953) 17

Brown v. *Board of Education,* 349 U. S. 294 (1955) 13

PAGE

Cascade Natural Gas Corp. v. *El Paso Natural Gas Co.*, 386 U. S. 129 (1967) 15
Commonwealth v. *Brown*, 373 F. 2d 771 (3d Cir. 1967) 10
Commonwealth v. *Brown*, 260 F. Supp. 323 (E. D. Pa. 1966) 9, 10
Commonwealth v. *Brown*, 260 F. Supp. 358 (E. D. Pa. 1966) 9
Commonwealth v. *Brown*, 270 F. Supp. 782 (E. D. Pa. 1967) 2, 10
Evans v. *Newton*, 382 U. S. 296 (1966) 11, 16, 19, 20 21, 22, 26
Florida ex rel. Hawkins v. *Board of Control* 347 U. S. 971 (1954) 14
Florida ex rel. Hawkins v. *Board of Control* 350 U. S. 413 (1956) 14, 15, 16
Girard College Trusteeship, 391 Pa. 434, 138 A.2d 844 (1958) 6, 14, 18, 27
Girard Estate, 4 Pa. D.&C.2d 671, 708 (Orphans' Ct. Phila. County 1956) 4, 13
Girard Estate, 7 Fiduc. Rep. (Pa.) 555 (Orphans' Ct. Phila. County 1957) 5, 6
Girard Estate, 7 Fiduc. Rep. (Pa.) 606 (Orphans' Ct. Phila. County 1957) 6
Girard Estate, 7 Fiduc. Rep. (Pa.) 608 (Orphans' Ct. Phila. County 1957) 6
Girard v. *Philadelphia*, 74 U. S. (7 Wall.) 1 (1868)4, 13
Girard Will Case, 386 Pa. 548, 127 A. 2d 287 (1956) 4, 5, 13, 27
Marsh v. *Alabama*, 326 U. S. 501 (1946) 21
Pennsylvania v. *Board of Directors of City Trusts*, 353 U. S. 230 (1957) 5, 13
Pennsylvania v. *Board of Directors of City Trusts*, 357 U. S. 570 (1958) 6, 14
Pierce v. *Society of Sisters*, 268 U. S. 510 (1925) 22
Reitman v. *Mulkey*, 387 U. S. 369 (1967) 23, 25

PAGE

Shelley v. *Kraemer*, 334 U. S. 1 (1948) 11, 16
Sweatt v. *Painter*, 339 U. S. 629 (1950) 13
Sweet Briar Institute v. *Button*, 12 Race Rel. L. Rep. 1188 (1967) 17
Sweet Briar Institute v. *Button*, 387 U. S. 423 (1967) 17
Vidal v. *Girard's Executors*, 43 U. S. (2 How.) 127 (1844) 4, 13

CONSTITUTION OF THE UNITED STATES:

Fourteenth Amendment, Section I 3

STATUTES:

Act of June 30, 1869, P. L. 1276, 53 Purdon's Pa. Stat. Ann. §§ 16365-16370 3
Act of Nov. 19, 1959, P. L. 1526 (20 Purdon's Pa. Stat. Ann. §§ 1144.1-1144.9) 3, 24
Pennsylvania Public Accommodations Act of 1939, Pennsylvania Penal Code of June 24, 1939, P. L. 872, § 654 (18 Purdon's Pa. Stat. Ann. § 4654) . 9, 16
28 U. S. C. § 1254(1) 2
§ 1331 9
§ 1343(3) 9
42 U. S. C. § 1981 9
§ 1983 9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No.

REVELLE W. BROWN, JOHN A. DIEMAND, DR. GILSON COLBY ENGEL, FRED FOX, WALTER S. FRANKLIN, WALTER B. GIBBONS, ESQUIRE, HUBERT J. HORAN, JR., ESQUIRE, DR. LOUIS P. HOYER, FREDERICK H. LEVIS, DAVID F. MAXWELL, ESQUIRE, MRS. MINA F. OLIVER, ROLAND RODROCK RANDALL and HARRY G. SCHAD, Trustees of the Estate of Stephen Girard,

Petitioners,

v.

COMMONWEALTH OF PENNSYLVANIA, ATTORNEY GENERAL OF THE COMMONWEALTH OF PENNSYLVANIA, CITY OF PHILADELPHIA and ALAN LEVI BOND, by his mother, MRS. RUBY BOND, CHARLES WILLIAM HICKS and THEODORE LEWIS HICKS, by their mother, MRS. MARIE HICKS, JAMES SCRUGGS and HENRY SCRUGGS, by their mother, MRS. ARDELLA SCRUGGS, TYRONE KARL WHITE and TERRY SHERWOOD WHITE, by their mother, MRS. CHARLOTTE L. WHITE, on behalf of themselves and all others similarly situated,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioners, Trustees of the Estate of Stephen Girard, pray that a writ of certiorari issue to the United States Court of Appeals for the Third Circuit to review the judg-

ment of that Court in affirming the Order of the United States District Court for the Eastern District of Pennsylvania.

OPINIONS BELOW

The Opinion of the United States District Court for the Eastern District of Pennsylvania, entered July 5, 1967 (App. A34-A53)[1], is reported at 270 F. Supp. 782. The Opinion and Concurring Opinions of the United States Court of Appeals for the Third Circuit, entered March 7, 1968 (App. A54-A72) are not yet officially reported.

JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit was entered on March 7, 1968. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

QUESTION PRESENTED

If a governmental agency has been removed as trustee of a charitable testamentary trust for the care and education of "poor white male orphans" by the state court having jurisdiction, and private trustees have been appointed, all because this Court had held that the governmental agency, even though acting only in a fiduciary capacity, could not constitutionally so administer the gift; and if those private trustees have operated the charity for the testamentary beneficiaries during the past ten years without any governmental contacts except those common to

---

[1]References to the Appendix included herewith shall be by "App." and the page numbers are preceded by an "A". References to the Appendix in the Court of Appeals shall be by an "R." and the page numbers are followed by an "a".

all such charities and institutions, does the equal protection clause of the Fourteenth Amendment require those trustees to enlarge the class of beneficiaries by admitting Negro children otherwise qualified?

CONSTITUTIONAL AND STATUTORY PROVISIONS

The pertinent portion of the Fourteenth Amendment to the Constitution of the United States provides:

> "... No State shall ... deny to any person within its jurisdiction the equal protection of the laws."

The Pennsylvania Act of November 19, 1959, P. L. 1526, 20 Purdon's Pa. Stat. Ann. §§ 1144.1-1144.9, cited by the Court of Appeals, is set forth in full *infra* (App. A29-A33).

STATEMENT

This litigation is a sequel to similar related litigation that was concluded in this Court a decade ago. Both the prior and the present proceedings involve the constitutionality, in the light of the Fourteenth Amendment, of the provision in the Will of Stephen Girard, who died in 1831, which limited to "poor white male orphans, between the ages of six and ten years," the right to be admitted to the "College" or "Orphan establishment" for the construction and maintenance of which Girard left his residuary estate to the City of Philadelphia, its successors and assigns, as Trustee[2]. (R. 44a, 45a, 53a).

---

[2]The institution opened in 1848 (R. 10a) under the trusteeship of the City of Philadelphia. Later, pursuant to the Pennsylvania Act of June 30, 1869, P. L. 1276, 53 Purdon's Pa. Stat. Ann. (1957) §§ 16365-16370, the administration of the College was transferred, together with that of other charitable trusts for which the City was Trustee, from the City to a Board of Directors of City Trusts created by the Commonwealth.

A. The Prior Related Litigation.

The prior related litigation was instituted on September 30, 1954 when several Negro boys, whose applications for admission to Girard College had been rejected because the applicants were not white, filed a Petition for Citation in the Orphans' Court of Philadelphia County to the Board of Directors of City Trusts which was then the trustee, to show cause why they should not be considered for admission to Girard College without discrimination based on race or color. The City and the Commonwealth intervened on the side of the applicants. After answer and hearing, the petitions were dismissed by the Hearing Judge, *Girard Estate,* 4 Pa. D. & C. 2d 671 (1955), and exceptions were later dismissed by the Orphans' Court *en banc* on January 6, 1956, 4 Pa. D. & C. 2d 708 (1956). The Orphans' Court held that the exclusion of Negroes from Girard College by the Board of Directors of City Trusts, pursuant to the explicit terms of Girard's Will, did not constitute "State action" prohibited by the Fourteenth Amendment, since the College is a private, not a public school, and the City, acting through the Board of Directors of City Trusts, was serving only in a fiduciary capacity.

The Supreme Court of Pennsylvania affirmed, *Girard Will Case,* 386 Pa. 548, 127 A. 2d 287 (1956), and in doing so pointed out, as had this Court, in another context, in *Vidal* v. *Girard's Executors,* 43 U. S. (2 How.) 127, 186-187 (1844), and in *Girard* v. *Philadelphia,* 74 U. S. (7 Wall.) 1, 13 (1868), and as had the Orphans' Court (4 Pa. D. & C. 2d 671, 714), that, if the City could not lawfully act as Trustee in carrying out Girard's dominant purpose to establish a private institution for poor white male orphans, the Orphans' Court should remove the City as

trustee and appoint a substituted trustee in its place. 386 Pa. at 566, 127 A. 2d at 295.

The Commonwealth, the City and the Negro applicants then appealed to this Court, which dismissed the appeal, but, treating it as a petition for certiorari, granted the writ and, without oral argument, reversed the judgment of the Supreme Court of Pennsylvania. The sole ground for doing so was that even though the City, acting through the Board of Directors of City Trusts, was merely serving as a trustee, its operation of the College was nevertheless as an agency of the Commonwealth, so that the Board's refusal to admit the Negro applicants solely because they were not white was accordingly discrimination by the State, forbidden by the Fourteenth Amendment. *Pennsylvania* v. *Board of Directors of City Trusts,* 353 U. S. 230 (1957), rehearing denied 353 U. S. 989. In its *per curiam* opinion, this Court did not direct that the Negro applicants be admitted. Instead it merely remanded the cause "for further proceedings not inconsistent with this opinion." For the convenience of this Court the opinion and order are reproduced in full in the Appendix hereto at pages A1-A2.

In turn, the Supreme Court of Pennsylvania vacated the decrees of the Orphans' Court and remanded the cause to that court for further proceedings not inconsistent with the opinion of this Court. *Girard Estate,* 7 Fiduc. Rep. (Pa.) 555 (1957). Thereafter, "in obedience to the mandate of the United States Supreme Court dated June 11, 1957, and the order of the Supreme Court of Pennsylvania filed June 28, 1957, and in conformity with the opinion of the Supreme Court of Pennsylvania, dated November 12, 1956," the Orphans' Court entered a decree dismissing the petitions of the Negro applicants for admission to Girard College, removing the Board of Directors of City Trusts as Trustee

of Girard's estate, effective upon the court's appointment of a substituted trustee, and directing the Board to transfer the records and assets of the estate to the substituted trustee promptly after the latter's appointment and qualification. *Girard Estate,* 7 Pa. Fiduc. Rep. 555, 558-559 (1957). For the convenience of this Court that opinion and decree are reproduced in full in the Appendix hereto at pages A3-A7. The Orphans' Court subsequently also denied petitions filed by the Negro applicants and by the City and Commonwealth for reconsideration and vacation of such decree. *Girard Estate,* 7 Fiduc. Rep. (Pa.) 608 (1957) (App. A3). The Orphans' Court at the same time entered a decree appointing thirteen individuals as Substituted Trustees of the estate. *Girard Estate,* 7 Fiduc. Rep. (Pa.) 606 (1957).

Again there was an appeal to the Pennsylvania Supreme Court, which affirmed on the ground that the Orphans' Court had properly construed the mandate of this Court and that the substitution of the private trustees for the public trustees to carry out Girard's intent was not itself "state action". *Girard College Trusteeship,* 391 Pa. 434, 138 A. 2d 844 (1958). This opinion is reproduced in full in the Appendix at A8-A27.

The Commonwealth, the City and the applicants once more appealed to this Court, arguing as a primary ground for reversal that this Court's mandate had been disregarded. This Court, again without oral argument, dismissed the appeal and, treating the appeal as a petition for certiorari, denied certiorari without opinion, *Pennsylvania* v. *Board of Directors of City Trusts,* 357 U. S. 570, *rehearing denied,* 358 U. S. 858 (1958), (App. A28).

Since the removal of the Board of City Trusts, the Girard trust has been administered solely by thirteen individual trustees appointed by the Orphans' Court.

B. The Nature of Girard College.

Girard College is located in North Central Philadelphia on a tract of ground approximately 43 acres in extent, which at the time of Girard's death, 137 years ago, was a farm outside the then city limits. There are about 25 buildings on the campus and the whole is surrounded by a stone wall 10 feet in height, as prescribed in the Will of Stephen Girard. There are only two gates in this wall, one being a service gate for deliveries only and the other being a main gate at which a watchman is constantly stationed. The public is not permitted in, and the children are not permitted out, except by special permission (R. 479a; Ex. D1, an aerial photograph).

No orphan boy is admitted into the institution until after the mother or guardian has made a formal written application and the boy has been examined by the resident doctor, the institution's psychologist, and tested for both intelligence and achievement. The mother, if any, is also interviewed by the institution's field representatives, or social workers. The Admissions Committee makes its recommendation as to each applicant to the President of the College who in turn makes his recommendation to the Trustees. Only the Trustees can approve final admission. From 25% to 30% of the applicants are rejected for psychological, intellectual or educational reasons (R. 479a).

Upon introduction into the institution, the mother or guardian of the orphan executes a document under which the legal custody and control of the orphan is transferred to the Trustees so long as the orphan remains in attendance at the institution. The Orphans' Court has also appointed the Trustees as guardians of the property of orphans during minority. Ordinarily the boys go to their homes for holidays, but if the boy's home has not been approved by the institution, he remains there continuously (R. 480a).

The institution provides elementary school and secondary school teaching on the premises (R. 246a). Admissions are accepted throughout the year up to March 31st (R. 254a).

The number of children attending the College is controlled by the amount of income available from Girard's residuary estate (R. 52a, 53a). Since it now costs about $3,000 per year to maintain and educate each child (R. 318a), the present enrollment is about 720 (R. 404a), whereas in 1933, when costs were much less, the enrollment was as high as 1739 (Ex. P-38).

The College is supported entirely by the income from the trust. It has never received funds from any governmental unit.

None of the thirteen individual Trustees has any governmental status. None of the employees of the estate is also an employee of the federal, state or city governments. No government official, city, state or federal, participates with the Trustees, or even advises the Trustees, in the administration of the trust (R. 761a-762a, 794a).

C. The Present Litigation.

The present litigation was instituted on December 16, 1965, when the Commonwealth of Pennsylvania, its Attorney General, the City of Philadelphia and seven poor male orphans between the ages of six and ten years, whose applications for admission to Girard College had been denied because the applicants are not white, as required by Girard's Will, filed a complaint (R. 4a-125a) in the United States District Court for the Eastern District of Pennsylvania to enjoin the Substituted Trustees of Girard's estate from refusing to admit the minor plaintiffs and other applicants to Girard College solely because of their race. The minor plaintiffs sued on behalf of themselves and all others similarly situated. Jurisdiction of the District Court was asserted

under 28 U. S. C. §§ 1331 and 1343(3) and 42 U. S. C. §§ 1981 and 1983.

The Complaint was in three Counts. Count I charged that the denial of admission to the minor plaintiffs because they are not white, as required by Girard's Will, violated their constitutional right under the Fourteenth Amendment to the equal protection of the laws. Count II sought to have the cy pres doctrine applied on the theory that Girard's dominant purpose in providing for the orphan establishment was to benefit the City, which now has a great need for facilities to educate and train Negro children, and that Girard's basic purpose can only be achieved by admission of Negroes. Count III was based on the theory that exclusion from the orphan establishment on the basis of race violated the Pennsylvania Public Accommodations Act of June 24, 1939, P. L. 872, § 654, 18 Purdon's Pa. Stat. Ann. § 4654.

The defendant Trustees (Petitioners here) moved to dismiss the Complaint on a number of grounds, including res judicata and lack of jurisdiction (R. 126a). On December 2, 1966 the District Court (per Joseph S. Lord, III, J.) filed its opinion and order generally denying defendants' motion. *Commonwealth of Pennsylvania* v. *Brown,* 260 F. Supp. 323 (E. D. Pa., 1966) (R. 132a). Thereafter, following the filing of defendants' Answer, hearings were held on Count III, the Public Accommodations Act Count. On November 2, 1966 Judge Lord entered an opinion and final injunction under that Count. *Commonwealth of Pennsylvania* v. *Brown,* 260 F. Supp. 358 (R. 477a). However, the Court of Appeals for the Third Circuit vacated that order on the ground that the Pennsylvania courts had already held that the Pennsylvania Public Accommodations Act does not apply to Girard College; and the case was remanded to the District Court so as to permit it to continue

with further proceedings relating to Count I, the Constitutional Count. *Commonwealth* v. *Brown,* 373 F. 2d 771 (3rd Cir. 1967). (R. 525a-555a).

The District Court then held hearings on Count I, and on July 5, 1967, entered a decree ordering that the action should be maintained as a class action, the class to consist of all poor male orphans who would be eligible for admission to Girard College except for the fact that they are not white, and permanently enjoining defendants from denying admission to Girard College to any members of such class on the ground of their not being white. *Commonwealth of Pennsylvania* v. *Brown,* 270 F. Supp. 782 (App. A34-A53).

The Court of Appeals for the Third Circuit affirmed the District Court on March 7, 1968 (App. A54-A65). The opinion of the Court of Appeals was written by McLaughlin, Circuit Judge. Concurring opinions were filed by Circuit Judges Kalodner and Van Dusen (App. A66-A72).

The defendant Trustees now petition this Court for a writ of certiorari to review the judgment of the Court of Appeals. Pending the disposition of this petition the Court of Appeals has continued the stay of the District Court's order.

REASONS FOR GRANTING THE WRIT

In a classic understatement, the District Court observed that some of the constitutional questions presented by the Complaint in this case "are on the frontier of the Fourteenth Amendment." *Commonwealth* v. *Brown,* 260 F. Supp. 323, 332 (E. D. Pa. 1966) (R. 142a).

The fact is that the decision of the Court of Appeals extends well beyond that frontier, as it has been delineated by this Court. Thus:

(1) The majority and one of the concurring judges of the Court of Appeals have held that the appointment of substitute trustees by the Orphans' Court in performance of its customary judicial duty, so that they might carry out Girard's intent, was denial of the equal protection of the laws under the principle of *Shelley* v. *Kraemer,* 334 U. S. 1 (1948), although this Court has not yet extended that rule to encompass an unwilling seller, or in this case testator and trustees, and even though the Solicitor General's argument in *Evans* v. *Newton,* 382 U. S. 296 (1966) that the rule should be applied to the substitution of trustees was pointedly ignored.

(2) The majority has also held that this case is governed by *Evans* v. *Newton,* supra, although in that case the decision was based (a) on the absence of proof that the mere substitution of private trustees would bring about a change in the municipal maintenance and concern over the park, whereas in this case, it is undenied that in the ten years since the appointment of private trustees there has been no municipal or other governmental involvement in the administration of the school or trust; and (b) on the public nature or function of the open park, whereas in this case, the school is both economically and physically private, and this Court has not held that such education is a public function.

If *Shelley* and *Evans* are to be extended to prevent the implementation, through the use of long-established judicial procedures, of a donor's completely private choice of a limited class of beneficiaries, or if private and parochial schools are to be subjected to the same constitutional limitations that apply to public schools because education is a "public function", it is this Court which should say so, and then only after full consideration of the merits.

Moreover, this Court should also declare the significance of its denial of certiorari in the second Girard appeal, after having remanded the case without a direction to admit the Negro applicants. Although the rule in the ordinary case is that the denial of certiorari implies nothing as to the merits, it would seem that when a second petition raises the issue of compliance with a prior mandate, the denial necessarily constitutes approval of the lower court's response to that mandate. It is impossible to conceive that this Court would have been so indifferent to the rights of the Negro applicants that it would have permitted the Pennsylvania courts to refuse their admission and to appoint private trustees, unless this Court had been of the opinion that the appointment was consistent with its mandate and that the private trustees could thereafter constitutionally carry out Girard's intent.

The questions involved are substantial and of major future significance to the administration of estates, to judicial procedures and to the role of non-public education.

I. The Meaning and Effect of This Court's Mandate and Subsequent Denial of Certiorari in the Prior Litigation Are Peculiarly For This Court's Decision.

In the prior litigation this Court first held that the Board of Directors of City Trusts was an agency of the Commonwealth of Pennsylvania and therefore, even though the Board was acting only as a trustee, its refusal to admit the minor plaintiffs to Girard College because they were not white was unconstitutional discrimination forbidden by the Fourteenth Amendment. Accordingly, this Court reversed the judgment of the Supreme Court of Pennsylvania and remanded the cause "for further proceedings not inconsistent with this opinion." *Pennsylvania* v. *Board of*

Directors of City Trusts, supra (App. A2), rehearing denied 353 U. S. 989. In issuing its mandate in that form, rather than directly ordering that the Negro applicants be admitted to the institution, as had been done in *Sweatt* v. *Painter,* 339 U. S. 629 (1950), and *Brown* v. *Board of Education,* 349 U. S. 294 (1955), this Court was presumably fully aware of the reiterated principle, both in its own opinions and in those of the Supreme Court of Pennsylvania and the Orphans' Court of Philadelphia, that if for any reason the Trustee of Girard's estate (i.e., the City, acting through the Board) did not have legal capability to carry out Girard's wishes in respect of the College, another trustee without constitutional limitations should be substituted in the City's stead. *Vidal* v. *Girard's Executors,* 43 U. S. (2 How.) 127, 186-187 (1844); *Girard* v. *Philadelphia,* 74 U. S. (7 Wall.) 1, 13 (1868); *Girard Will Case,* 386 Pa. 548, 566, 127 A. 2d 287, 295 (1956); *Girard Estate,* 4 Pa. D. & C. 2d 671, 714 (1955).[3] Since this Court had ample foreknowledge that in the event of the City's constitutional incapacity to carry out the Girard College trust, the Orphans' Court would be under a legal duty to substitute a trustee who would have the necessary capacity

---

[3]The following statement by the Pennsylvania Supreme Court had left no doubt as to what it would do unless directed otherwise by this Court (386 Pa. at 566):

> "But finally, even if the Board of Directors of City Trusts *were* deemed to be engaged in 'State action' in the administration of the Girard trust, petitioners would nevertheless not be entitled to the remedy they seek. If the city, because bound in its public or governmental actions by the inhibition imposed upon it by the Fourteenth Amendment, cannot carry out a provision of Girard's will in regard to the beneficiaries of the charity as prescribed by him, the law is clear that the remedy is, not to change that provision, which, as an individual, he had a perfect right to prescribe, but for the Orphans' Court, which has final jurisdiction over the trust which he created, to appoint another trustee."

unless directed not to do so, it is a reasonable inference that by the failure to provide otherwise in its mandate this Court approved in advance the subsequent action of the Orphans' Court in removing the Board of Directors of City Trusts as Trustee and substituting in its place thirteen individual trustees.

This interpretation of the mandate is necessarily confirmed by this Court's subsequent refusal to review the decision of the Pennsylvania Supreme Court despite the argument that the Orphans' Court had disobeyed this Court's mandate by denying the petitions of the Negro applicants. *Girard College Trusteeship,* supra, cert. den. sub nom. *Pennsylvania* v. *Board of Directors of City Trusts,* 357 U. S. 570, rehearing denied 358 U. S. 858.

The Court of Appeals in the present case brushed aside the necessary implication of this Court's denial of certiorari in the second appeal. In doing so the Court of Appeals simply invoked the ordinary rule that no inference is permissible, favorable or unfavorable, from the denial of an application to this Court for a writ of certiorari. However, while it is certainly true that in the usual case the denial of a petition for certiorari is without significance on the merits, no precedent exists for applying that rule when the issue is whether a *prior mandate* has been obeyed. On the contrary, what cases there are show, as one would expect, that this Court will tolerate no avoidance or misinterpretation of its orders.

In *Florida ex rel. Hawkins* v. *Board of Control,* 347 U. S. 971 (1954), this Court had reversed and remanded a law school desegregation case "for consideration in the light of" the *Brown* case without further explanation. The lower court did not take prompt steps to effect the admission of the Negro applicant, and the case was again appealed. *Florida ex rel. Hawkins* v. *Board of Control,* 350 U. S. 413

(1956). This Court granted certiorari, recalled and vacated its prior mandate, and in lieu thereof issued an order directing the applicant's admission without delay if otherwise qualified. That is what this Court would presumably also have done in the second Girard appeal if it had believed its mandate had been avoided by the substitution of private trustees, particularly when the State court's interpretation of the mandate and the reasons therefor were so clearly stated. Again, as recently as last year this Court reversed and remanded in the second appeal of an anti-trust case on the ground that the action of the lower court in response to its first order "does the opposite of what our prior opinion and mandate commanded." *Cascade Natural Gas Corp.* v. *El Paso Natural Gas Co.*, 386 U. S. 129 (1967).

The Court of Appeals has attempted to avoid the conclusion that by denying certiorari this Court necessarily found that its mandate had not been disregarded or circumvented, by saying that the "then existing state litigation picture" presented to this Court on the second appeal was "muddy" and not in "sharp focus". (App. pp. A62-63). But, to the contrary, the situation was crystal clear. The opinion of the Orphans' Court under review stated that in order to harmonize the opinions of the United States Supreme Court and the Pennsylvania Supreme Court with Girard's primary purpose to benefit "poor white male orphans" only, the City must be removed as trustee and the petitions of the two negro applicants must be denied. The order itself dismissed the applicants' petitions (App. A6-A7). The Jurisdictional Statement to this Court specifically raised the question whether denial of admission to the applicants because of their color was in compliance with this Court's prior mandate. It could not have been more obvious that denial of certiorari would permanently prevent the admission of the Negro applicants; and if the prior opinion

and mandate of this Court had been intended to direct their admission, regardless of the identity of the trustee, there can be no doubt that certiorari would have been granted.[4] See *Florida ex rel Hawkins* v. *Board of Control,* supra.

II. The Court of Appeals Has Erroneously Extended the Doctrine of *Shelley* v. *Kraemer*.

Although the majority opinion is diffuse in its reasoning, it would seem that the principal basis for affirmance of the District Court is that the substitution of the private trustees for the governmental trustee, to permit the continued effectuation of Girard's purpose, itself constituted "state action."[5] In support thereof, there is cited *Shelley* v. *Kraemer,* 334 U. S. 1 (1948).

---

[4]In *Evans* v. *Newton,* 382 U. S. 296 (1966), the Solicitor General, appearing for the United States as amicus curiae, argued in his Brief (pp. 11-12) that the denial of certiorari in the second *Girard* appeal might have been on the ground that it was not clear that the private trustees would or could operate the College on a segregated basis because the Pennsylvania Public Accommodations Act, 18 Pa. Purd. Stat. Ann. § 4654 expressly forbids racial discrimination in schools. However, a review of the Jurisdictional Statement and briefs filed with this Court in the second *Girard* appeal shows that the Pennsylvania Accommodations Act was never cited and, even more significant, the argument overlooks the fact that the issue in the second *Girard* appeal was the dismissal of the petitions of the two applicants and not the fate of future applicants.

[5]On the other hand, the District Court held that the substitution of Trustees was not of itself unconstitutional state action prohibited by *Shelley* (R. 854a-856a). That Court, however, found state action in the "continuing interest" of the Orphans' Court in the administration of the trust (R. 862a-863a); but in so doing it also committed error because of lack of understanding of Orphans' Court practices. It would have been inconceivable for the Orphans' Court to have appointed trustees without first ascertaining that they would serve; the regular accounts are for convenience in settling the estate of a deceased trustee; and the certificates of appointment are the only forms of recognition that the trustees, who serve without compensation, have received. No member of the Orphans' Court has ever involved himself in the administration of the College (R. 674a); and the docket entries show that the Court has dealt only with purely routine matters of trust administration (Ex. D-11).

This is the first case in which the doctrine of *Shelley* has been extended to prevent the exercise of traditional judicial power to make possible the exercise of a purely private decision to distinguish between races. In *Shelley,* and in the subsequent similar case of *Barrows* v. *Jackson,* 346 U. S. 249 (1953), the seller of the real estate subject to the racially restrictive covenant wished to ignore the covenant and to sell to the prospective Negro buyer. It was quite properly held that the state, acting through the judicial branch, could not prevent the transaction since, because of the willingness of the seller, the Negro buyer had a constitutionally protected civil right to buy. To the same effect is the *Sweet Briar Institute* litigation incorrectly relied upon by the majority (App. A64). In that case, unlike the present one, the trustees of Sweet Briar were willing to ignore the testamentary restriction to "white girls and young women", and the state attorney general was properly enjoined from instituting proceedings to compel them to adhere to the restriction. *Sweet Briar Inst.* v. *Button,* 387 U. S. 423 and, on remand, 12 Race Rel. L. Rep. 1188 (not officially reported).

Those decisions are vastly different from the present holding which, in effect, denies to an individual the use of expected judicial procedures for the implementation of a personal gift to a specified class of beneficiaries. Despite the surmise in the majority opinion that Girard would be "quietly happy" that the College is being opened to nonwhites (App. A65), the fact remains that Girard said "white",[6] that there is no evidence that he would be of a different mind today, that the Trustees are unwilling to deviate from his directions, and that therefore in the lexicon of the *Shelley* doctrine there is no willing seller to create a right in these applicants.

---

[6]The Pennsylvania courts have held that Girard's principal purpose was to benefit only "poor white male orphans". (App. A5-A6).

In the opinion of the Pennsylvania Supreme Court sustaining the substitution of trustees as being consistent with this Court's mandate and also as being constitutional itself, this subject is examined at length (App. A19-A26). Although the entire discussion should be considered, the following excerpts will show the basis for the Pennsylvania Supreme Court's decision:

> "No useful purpose would be served by discussing at greater length the jurisdiction of the Orphans' Court over testamentary trusts and their fiduciaries or the power of that court to remove a trustee who is incapable or fails or refuses to carry out a trust as its creator directed. Such a situation calls for the removal of the incapable trustee and the substitution of a fiduciary able to administer the trust as its provisions require; and the jurisdiction and power of the Orphans' Court to that end is not open to question. Here, there is a conclusively adjudicated want of capacity in the Board of City Trusts to administer Girard College in accordance with the intention and directions of the testator's will. There was, therefore, nothing other for the Orphans' Court to do in the circumstances but to remove the inhibited trustee and appoint trustees capable of administering the College as Stephen Girard intended and prescribed." (App. A19)

> "The undisputed facts in the *Shelley* case made it clear that, but for the active intervention of the State court, the Negro purchasers would have been free to occupy the properties in question without restraint. Thus, the State had made available to the covenantees the full coercive power of govern-

> ment to deny to the Negro purchasers, on the ground of race or color, their constitutional right to own and enjoy property which they were willing and financially able to acquire and which the grantors were willing to sell. As contrasted by the Supreme Court, 'The difference between judicial enforcement and non-enforcement of the restrictive covenants is the difference to the petitioners between being denied rights of property available to other members of the community and being accorded full enjoyment of those rights on an equal footing.' In the instant case, no one not possessing the qualifications prescribed by Girard's will for admission to the Orphanage can claim any right that entitles him to share Stephen Girard's largesse on an equal, or any, footing with those whom Girard himself expressly made the beneficiaries of his bounty." (App. A21)

This Court declined to review that decision by the Pennsylvania Supreme Court, and since the present holding of the Court of Appeals is directly contrary, certiorari should now be granted.

III. The Court of Appeals Has Erroneously Extended the Holdings in *Evans* v. *Newton*.

The majority of the Court of Appeals has said that it must agree with the District Court that "the facts in *Evans* v. *Newton*, 382 U. S. 296, 301, 302 (1966) are fairly comparable to those in this appeal and that the decision of the Supreme Court therein governs the issue before us" (App. A63).

Evans involved an open park in Macon, Georgia, which in 1911 had been left in trust to the City for the use of white people only. Following the decision of this Court in the

first Girard case, the City of Macon, realizing it could not constitutionally carry out the purpose of the testator, resigned and three individual trustees were appointed by the appropriate court. The Supreme Court of Georgia affirmed, but, on certiorari, this Court reversed.

Before considering the applicability of the rationale of that decision to this case, it is of importance to note what this Court did not do in *Evans*. This Court did not adopt the argument of the Solicitor General that the Georgia state court's acceptance of the City's resignation and the appointment of private trustees, for the purpose of carrying out the testator's discriminatory intent, was itself unconstitutional state action. (See Brief for the United States as Amicus Curiae, pp. 25-26 in that case). It would have been a simple matter for this Court to have decided on that basis if the Solicitor General's argument had been considered sound. The fact that this was not done argues strongly against acceptance of the Court of Appeals' opinion in this case which, as we have seen, is based largely on this theory.

The actual opinion in *Evans* has two facets, one of which is clearly not applicable here and the other of which would have far-reaching and dangerous consequences if applied here.

A. Unlike Evans, the record in this case shows that Girard College has been totally divorced from municipal responsibility or concern since the appointment of private trustees.

The first ground for the decision in *Evans* was that the City had for years maintained the park as a part of its public park system—"it was swept, manicured, watered, patrolled and maintained by the city as a public facility for whites only"—and this Court would not assume that the mere appointment of private trustees would change that

situation. As was said: "The momentum it acquired as a public facility is certainly not dissipated *ipso facto* by the appointment of 'private' trustees. So far as this record shows, there has been no change in municipal maintenance and concern over this facility." 382 U. S. at 301.

The record in the Girard College case is totally different. There can be no doubt that Girard College was completely divorced from its former city relationship in 1959. No State or City officer or appointee has participated in the operation of the College since then, almost ten years ago (R. 761a-762a, 794a, 783a). Not a penny of City or State money has ever been used for its support (R. 847a, 869a). None of its property is now or ever was owned by the City or State. No State or City legislation fosters, protects or directs it. As a private school and as an orphanage its relationships with the City and State are only those applicable to every unlicensed private or parochial school and all other charitable child care agencies.[7] The separation was and is complete.

To the extent that the basis for *Evans* was that the future relationship between the City and the park could not be foretold, that basis certainly does not exist here because the record is a matter of fact and not forecast.

B. The Court of Appeals has incorrectly extended the Evans concept of public function to private schools.

The second ground for the *Evans* decision is that an open park such as Baconsfield is performing a "public function", is in the "public sector" or "public domain" and, like the company town in *Marsh* v. *Alabama*, 326 U. S. 501 (1946), must be operated under constitutional restrictions.

---

[7]The insubstantiality of these relationships will be dealt with fully if the writ is granted.

Although in *Evans* this Court was careful to say that it was not equating private or parochial schools with parks, (citing *Pierce* v. *Society of Sisters,* 268 U. S. 510 (1925) for the right to maintain a parochial school), the opinion of the Court of Appeals makes no such distinction. Instead, by quoting merely the statement of Mr. Justice Douglas in the majority opinion that "the public character of this park requires that it be treated as a public institution" (App. A62), a strong inference is created that the court is holding that the function of education is also public for constitutional purposes.

This must be the conceptual breadth of the Court of Appeals' holding because factually Girard College cannot be likened to Baconsfield Park. The Brief of the United States in *Evans* shows that the park is approximately 100 acres in extent, is located in the center of Macon, is open on all sides, is segmented and traversed by a number of public streets and at least one major highway, and might be visited freely by all members of the public except Negroes. Save for that one exception, it is to all intents and purposes an ordinary public park maintained by the municipality just as all its other public grounds. Girard College, on the other hand, is surrounded by a high stone wall; only about two-thirds of the applicants are approved for admission; members of the public are not even allowed on the campus without special permission; and, in short, it is totally dissimilar to a public school or any other public facility (Supra, pp. 7-8).

The implications of a holding that education is per se public for the purposes of the Fourteenth Amendment, and therefore the First Amendment also,[8] would be far-reaching. Education in the United States is traditionally private and parochial, as well as public. The patterns thereby created

---

[8] *Abington School District* v. *Schempp,* 374 U. S. 203 (1963).

have become a part of the fabric of our social and religious life. If the freedom of selection which is essential to the continued existence of these non-public schools is to be eliminated, either directly or by erosion, and through judicial rather than legislative power, this Court should accept the responsibility.

IV. The Court of Appeals Has Erroneously Extended the Doctrine of *Reitman* v. *Mulkey* to the Neutral Exercise of Traditional Judicial Power.

The majority of the Court of Appeals has said that the action of the Orphans' Court in replacing the City with private trustees significantly encourages and involves the state in private discrimination, citing *Reitman* v. *Mulkey,* 387 U. S. 369 (1967) (App. A65). And Judge Van Dusen places his concurring opinion almost solely on *Reitman* (App. A70).

There is certainly no factual relationship between this case and *Reitman,* and it is difficult to see any conceptual relationship. In *Reitman* this court affirmed a California Supreme Court decision striking down an amendment to the California constitution, adopted by referendum, which provided that neither the State nor any subdivision or agency thereof may deny to any person the right to decline to sell or rent his real property to any person with whom he does not wish to deal. The basis for the decision appears to be that this amendment encouraged discrimination by according the right to discriminate a special status, immune from legislative, executive or judicial power.

Here the Orphans' Court merely performed its traditional duty of replacing a legally incompetent trustee with one who was capable of carrying out the testator's intent. There is no evidence or inference that by so doing the court

encouraged members of the public to discriminate on racial grounds in the testamentary disposition of their own property. And what is even more pertinent, the action of the court did not affect the power of the legislature to enact a law prohibiting discrimination because of race in every school in the state, nor did it confer a special status on the new trustees so as to make it impossible for them to ignore Girard's limitation if they should ever decide to do so.

The only realistic statement that can be made about the action of the Orphans' Court is that it thereby made possible the continuance of Girard's personal preference. But if that is unconstitutional state involvement, then so is the probate of any will making a gift to a class defined by reference to color or creed. In each instance judicial power is essential to the effectuation of the gift.

Judge Van Dusen also cited the Pennsylvania Act of November 19, 1959, P. L. 1526 (20 Purd. Pa. Stat. §§ 1144.1-1144.9) as being even clearer "encouragement" (App. A71). But he is in error in stating that this Act "authorized *ex post facto* the Orphans' Court's actions. . . ." (App. A71), if, by so saying, he means that the legislation retroactively authorized, or even approved, the substitution of trustees of the Girard Estate. The Act makes no reference whatsoever to the change in trustees of the Girard Estate or affects in any way the powers of those trustees in administering that estate.[9] Instead it provides that where a political subdivision holds property in a fiduciary capacity for *minors*, the local Orphans' Court is empowered to appoint a substitute fiduciary. This Act is applicable to the property of any minor, regardless of color. Although it probably was passed because the City was no longer the

---

[9]The majority opinion refers approvingly to a statement in the District Court's opinion that this Act contained other enabling legislation "without which the present defendants would be unable to carry out their duties" (App. A58, fn. 1). This is not so.

trustee of the Girard Estate, and thus there was no point in the City continuing as the appointed guardian of the property of the orphan boys attending the College, it cannot be said fairly that this encouraged or even condoned discrimination.[10]

Certainly the principle of *Reitman*, that discrimination or the right to discriminate cannot constitutionally be given a preferred or protected status, is not applicable factually or conceptually to this case.

V. The City's Historical Relationship Does Not Create Present State Action.

A subsidiary reason seemingly advanced by the Court of Appeals for its decision is the history of City trusteeship, which is summarized in a quotation from the District Court's opinion (App. A57).

It would not be appropriate in this petition to deal with the insufficiency of those state contacts individually, as will be done fully if certiorari is granted. At this stage it should be enough to show the desirability of an inquiry in depth by pointing out that none of those relationships, except the ones common to all public charities, such as tax exemption

---

[10]Nor is there any possibility that legislative policy might have encouraged Girard's original choice to limit his bounty to the white race, as was the case in *Evans*. In Pennsylvania the official policy was expressed in the Act of March 1, 1780, which, after declaring that all persons of all colors and features "are the work of an Almighty Hand," provided for the gradual abolition of slavery (R. 840a-841a). This policy of equality to all regardless of color was carried into the Pennsylvania school laws. Beginning in 1802 with the passage of the first Act to provide for free education of pauper children and continuing until Girard's death in 1832, none of the many statutes creating and regulating public schools made any distinction between pupils on the ground of race, creed or color. (Ex. D-11 contains all of the Pennsylvania Acts relating to schools passed prior to Girard's death.)

and former exemption from tort liability, has a present effect upon the trust or the College.[11]

The effort of the Court of Appeals to create the impression that there is a present benefit to the College from the City's former trusteeship because the amount of the trust fund is due to the "consistently brilliant showing" of the City as trustee (App. A57) is not supported by the record. A legislative committee appointed in 1842 because of public dissatisfaction with the City's performance as trustee reported there had been a loss of $900,000 through neglect and mismanagement. Herrick, *History of Girard College*, 22-23 (1923). From the commencement of the trust to 1959 when the City was discharged, the book value of the assets increased $66,091,592, but $61,350,241, or more than 90%, is made up of royalties received from coal lands wisely purchased by Girard just prior to his death, and which were acounted for as additions to capital rather than income (Ex. P-44, pp. 86, 87; R. 760a-761a). There is no evidence from which it can be concluded that the estate is any different in kind or amount than it would have been in the hands of non-governmental trustees.

Also, it has been determined as a matter of state law that the ancient statutes and ordinances which no longer have any significance but upon which the plaintiffs have relied to show present state involvement were either designed to enable the state and city to qualify for their bequests or were purely administrative measures not required by

---

[11]It is inherent in the *Evans* opinion that a long history of state participation through municipal trustees, and even through municipal maintenance, does not constitute *present* state involvement if that relationship is fully terminated. This Court merely said that it could "not take judicial notice that the mere substitution of trustees" would terminate the relationship completely. (382 U. S. at 301). If the mere history of state involvement creates state action for all time, there would have been no point in considering the nature of the park and the future role of the City.

Girard's will. *Girard College Trusteeship,* (App. A15-A16). It is also a matter of state law that the City had no governmental relationship to the trust but acted solely as a fiduciary, just as would a private trustee. *Girard Will Case.,* supra. Accordingly, the assets were never impressed with the governmental characteristics of the City, and the removal of the City from its position as trustee completely terminated state involvement.

CONCLUSION

The questions presented by this proceeding are of such a nature that they can be resolved only by this Court. If denial of a petition for certiorari has no substantive significance when the principal issue is compliance with a prior mandate, the bench and bar should be informed by the only Court truly qualified to speak. If the performance by the Orphans' Court of its traditional judicial duty, which did not compel unwilling compliance with the restrictive gift, is unconstitutional state action, the implications are so broad that this Court should express its opinion. If education has become such a "public function" that it must be conducted by private persons within the limits of the Fourteenth Amendment, the ramifications are such that only this Court should say so.

In considering the importance of these questions, and particularly in considering the total effect of the District Court's order upon the concept of private choice, there should be kept in mind the fact that neither Girard, nor the Orphans' Court, nor the trustees have denied any orphan child the right to maintenance at public expense and a public school education in a non-segregated school. What Girard intended was that some children, "poor white male orphans" should receive his bounty. This was a personal choice which, in turn, created rights in that designated class. The Penn-

sylvania courts, applying long established principles, have acted to preserve the right of the donor to give and the right of the designated class to receive that gift undiluted by the inclusion of others. In doing so, they have also confirmed the rights of all donors and all classes of beneficiaries no matter what their race, creed or color might be.

For the foregoing reasons the Petition for Certiorari should be granted.

Respectfully submitted,

ARTHUR LITTLETON

JOHN RUSSELL, JR.

ERNEST R. VON STARCK

RICHARD P. BROWN, JR.